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Supreme Court, U.S.
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No. 03-271

IN THE
Supreme Court of the United States

CAVALIER TELEPHONE, LLC,
Petitioner,

v.

VERIZON VIRGINIA INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MEMORANDUM FOR RESPONDENT

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September 22, 2003

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14 pgs

QUESTION PRESENTED

Did the court of appeals err by affirming the district court's dismissal of petitioner's antitrust claims?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Verizon Virginia Inc. states the following:

Verizon Virginia Inc. is a wholly owned subsidiary of Verizon Communications Inc. Verizon Communications Inc. has no parent company, and no publicly owned company owns 10% or more of its stock.

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MEMORANDUM FOR RESPONDENT

Verizon agrees with Cavalier that the antitrust merits issue presented by Cavalier's petition is also presented in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, No. 02-682. This case should accordingly be held pending the Court's decision in that case. Furthermore, Verizon agrees with Cavalier that, if *Trinko* is resolved only on standing grounds and therefore does not address the substantive Section 2 question presented by Cavalier's petition, the Court should grant Cavalier's petition to resolve it.

Cavalier's suit illustrates several consequences that would follow from expanding Section 2 to recognize the new discounted-sharing duty asserted by Trinko and Cavalier. Cavalier has deployed the powerful weapon of treble-damages antitrust litigation to evade its indisputable responsibilities under the agreement governing its purchases from Verizon under the Telecommunications Act of 1996 (the "1996 Act") and to mount collateral challenges to and sidestep the determinations of expert regulators on the very matters it wants a jury to determine in this suit. Cavalier's suit thus confirms some of the reasons advanced by Verizon in *Trinko* for not adding a novel Section 2 duty to supplement the comprehensive regime of the 1996 Act.

1. Cavalier filed its antitrust complaint in response to Verizon's demand that Cavalier pay millions of dollars it indisputably owed for services it had been receiving for a year and a half under the parties' State-approved agreement. By the time Cavalier filed its complaint in November 2001, it was serving customers over more than 100,000 telephone lines that it had leased from Verizon. Yet, it had stopped paying any of its bills from Verizon almost a year and a half earlier, including the large amounts not even placed in dispute. Between July 2000 and December 2001, Cavalier paid *nothing at all* for the facilities and services that Verizon had provided, accumulating a debt of around $17 million. For all that period, despite receiving no payment, Verizon continued to meet Cavalier's requests to provide ever increasing

volumes of facilities and services as Cavalier increased its customer base.

Shortly after Cavalier filed its antitrust complaint, it moved for a temporary restraining order ("TRO") to force Verizon to provide still additional facilities to Cavalier – *i.e.*, to furnish new unbundled network elements for Cavalier to use to serve newly acquired customers. Even though Cavalier admitted that it was "not financially troubled" and "can pay its bills, even the full amount," and that it "owe[d] [Verizon] some money," Cavalier complained that if it paid what it owed it would "have no leverage." Oral Arg. Tr. at 17-18 (Nov. 16, 2001). Most of the $17 million of unpaid bills was not in dispute, yet Cavalier paid nothing even though the procedures for resolving billing disputes expressly set forth in the Verizon-Cavalier agreement require payment of undisputed amounts. The district court judge denied the request for a TRO, noting that Cavalier had "simply opted not to pay" its bills, "apparently in the hope of gaining some leverage" in negotiations with Verizon. Mem. Op. at 4 (E.D. Va. Nov. 21, 2001).

2. In pressing its antitrust claims below, one of Cavalier's key factual allegations – and the only instance in which Cavalier claimed it was denied access to any facility – involved loops provided over an "Integrated Digital Loop Carrier" (or "IDLC"). IDLC is a technology that Verizon and other telephone companies have used to improve the quality and reliability of regular voice telephone service. Traditionally, customers' premises have been connected to the telephone company's switch over copper wires that run the distance from the customer premises all the way to the switch. IDLC permits the telephone company to extend fiber optic cables from the switch into a neighborhood or office park. At that point, the fiber is connected at a "remote terminal" to copper loops that run the rest of the way to the individual homes and offices.

Unbundling a loop that is provided over IDLC is complicated because the fiber part of the loop is a single indivisible piece of glass and the separable copper part of the loop

originates in a small metal box out in a neighborhood, usually far from a rival's facilities. Notably, Cavalier brought the same complaint about Verizon's refusal to provide access to IDLC loops to the Federal Communications Commission ("FCC") in the proceeding where Verizon sought and won authority to offer long-distance service in Virginia.[1] Cavalier argued that Verizon could unbundle IDLC loops and that, in any event, Verizon had failed to make appropriate alternative facilities available. *See* Comments of Cavalier Telephone, LLC at 12-14, WC Docket No. 02-214 (FCC filed Aug. 21, 2002). The FCC specifically rejected Cavalier's claims, holding that "it is not technically feasible to unbundle an IDLC loop" and noting that, "[n]evertheless, Verizon provides unbundled loops where the customer is served by IDLC by using spare copper facilities at the terminal or by performing a line station transfer to make spare copper facilities available." *Virginia 271 Order*, 17 FCC Rcd at 21963, ¶ 148. Thus, the FCC specifically concluded that access to IDLC loops is *not* feasible and that Verizon *is* providing adequate alternatives to serve potential customers. Cavalier's complaint seeks to relitigate these and comparable questions before a lay jury applying general antitrust standards.[2]

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[1] *See* Memorandum Opinion and Order, *Application by Verizon Virginia Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Virginia*, 17 FCC Rcd 21880 (2002) ("*Virginia 271 Order*"). The FCC granted the application, noting that "Verizon has taken the statutorily required steps to open its local exchange markets in Virginia to competition" and that, as a result, "barriers to competitive entry in Virginia's local exchange market have been removed, and . . . the local exchange market is open to competition." *Id.* at 21882, ¶ 1, 21988, ¶ 196.

[2] Indeed, the FCC has exhaustively and repeatedly addressed the scope of incumbent carriers' obligations to provide unbundled access to loops. Under the latest FCC order, Verizon is generally required to unbundle traditional telephone wires but is not required to unbundle next-generation fiber loops used to provide broadband service. *See* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338 *et al.*, FCC 03-36, ¶¶ 199,

3. Cavalier seeks to sidestep or override the regulatory regime in other ways as well. Under the 1996 Act, Verizon and Cavalier are parties to a "binding" agreement governing the terms on which Cavalier is entitled to use Verizon's facilities or services, and that agreement "fulfill[s]" Verizon's access duties. 47 U.S.C. §§ 251(c)(1), 252(a)(1). That agreement bound Cavalier upon exhaustion of Cavalier's clear statutory rights to challenge the adequacy of terms before agencies and courts. *Id.* § 252(b), (c), (e).[3] Yet many of Cavalier's allegations seek to establish antitrust liability based on Verizon's *compliance* with the terms of the parties' binding agreement.[4]

For example, Cavalier alleges that Verizon violated the Sherman Act by refusing to provide service "until Cavalier obtained a certificate of public convenience and necessity" from the Virginia public utility commission. Compl. ¶ 49 (Pet. App. 75). But this is exactly what the parties' agreement provides, in accordance with Virginia law. *See* Verizon Mot. to Dismiss, Exh. 1, at 4, § 2.6 (E.D. Va. filed Dec. 26,

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200 (rel. Aug. 21, 2003). The FCC has drawn fine distinctions with regard to hybrid fiber/copper loops depending on technology and the nature of the services to be provided. *See, e.g., id.* ¶ 288. Cavalier seeks to relitigate those very issues before a lay jury in a private antitrust suit.

[3] Cavalier's claim (at 14) that Verizon "voluntarily signed" the interconnection agreement is incorrect. Even though the parties may negotiate the particular terms to implement Verizon's statutory duties, Verizon has no choice about whether to enter into agreements that will "fulfill" those duties. *See* 47 U.S.C. § 251(c)(1). By contrast, a requesting carrier need not accept any provision of a proposed interconnection agreement, but can instead obtain expedited arbitration by state commissions, which are bound to enforce the 1996 Act's requirements. *See id.* § 252(b), (c).

[4] In fact, all of Cavalier's allegations were originally claimed to constitute offenses under the 1996 Act and the Communications Act of 1934 as well as antitrust law. All of the claims were dismissed, and Cavalier – on the afternoon before the oral argument in the Fourth Circuit – dropped its appeal except on the antitrust issue, thereby setting up its appeal as a test case for the legal theory that alleged disputes under the 1996 Act can provide the basis for an antitrust claim.

2001) ("Verizon-Cavalier Agreement") (Verizon shall have "no obligation to perform under this Agreement until such time as Cavalier has obtained a Certificate of Public Convenience and Necessity"); Va. Code § 56-265.3(A) ("[n]o public utility shall begin to furnish public utility service within the Commonwealth without first having obtained from the Commission a certificate of public convenience and necessity"). Next, Cavalier complains that Verizon provided space for Cavalier's equipment in the central offices housing Verizon's network switches – a process known as "collocation" – at the "expiration of the maximum 'interval'" contained in the agreement, *i.e.*, in *compliance* with Verizon's obligations. Compl. ¶ 64 (Pet. App. 77); *see* Verizon-Cavalier Agreement, Attach. IV. Cavalier also alleges that Verizon had "imposed unreasonable systems for directory assistance . . . listings and listings in directory publications" (Compl. ¶ 109 (Pet. App. 84)) – although these systems are specified in the agreement, *see* Verizon-Cavalier Agreement, Attach. VIII, Exh. A. Cavalier challenges charges for "loop conditioning" (Compl. ¶ 118 (Pet. App. 85)) – maintenance required to provide services over some copper loops – although these charges are incorporated into the parties' agreement, *see* Verizon-Cavalier Agreement, Attach. I. And Cavalier challenges the process for provision of space on Verizon's telephone poles or in Verizon's underground conduits (Compl. ¶ 127 (Pet. App. 87)) – although this process is specified in the agreement, *see* Verizon-Cavalier Agreement, Attach. VI.

Even if Section 2 were expanded to include a generalized duty to assist rivals along the lines of Cavalier's complaint, allowing relitigation of such matters would have the same harmful effects on the regulatory regime that this Court has long recognized as impermissible under the filed-tariff doctrine. Because agreements entered into under Section 252 are subject to state commission approval and, once approved, are "binding," and because their terms are available to other requesting carriers (47 U.S.C. § 252(a)(1), (e), (i)), such agreements are filed tariffs. *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) (contract filed with responsible

regulator governing terms of service constitutes a tariff). The Court's filed-tariff decisions recognize the harms of disuniformity and agency bypass from allowing antitrust damages based on claims to better services or lower prices than the State-approved terms. *See, e.g., AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 225 (1998) (whenever a rate or service matter is "*specifically addressed* by the filed tariff," challenge to the tariff terms as unlawful is barred); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986).

4. If much of Cavalier's suit seeks to override its own agreement adopted through the regulatory regime, the suit also illustrates how Section 2 suits would needlessly and harmfully supersede the regulatory agencies' close enforcement of the terms established under that regime. In particular, in every State where Verizon has sought and obtained Section 271 approval – including Virginia – Verizon has established "Performance Assurance Plans" that "provide[] further assurance that the local markets . . . will remain open after Verizon receives section 271 authorization." *Virginia 271 Order*, 17 FCC Rcd at 21989, ¶ 198. Such performance plans embody specific performance benchmarks that Verizon must satisfy. The plans provide for remedy payments to individual carriers in cases where Verizon's performance falls below relevant standards. In Virginia alone, Verizon has more than *$200 million* at risk under its performance assurance plan each year.

These performance assurance plans were the result of industry-wide "collaborative" discussions, overseen by state regulators, in which Cavalier itself has participated.[5] Verizon and its rivals jointly worked out which aspects of Verizon's performance would be of the greatest significance to rivals and established incentives to ensure that, if Verizon failed to perform, it would be forced to compensate its rivals. The

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[5] *See Establishment of a Performance Assurance Plan for Verizon Virginia, Inc.*, PUC-2001-00226 (Va. State Corp. Comm'n estab. Nov. 1, 2001).

terms of these plans have been adopted by state commissions overseeing the process of ensuring adequate – but not excessive – assistance.[6]

Adding a possible antitrust damages remedy on top of the compensation already provided to rivals under relevant regulatory schemes not only produces a potential windfall for the competitor plaintiff but also risks wreaking economic havoc on companies whose regulatory obligations already create unprecedented burdens. If a by-product of the forced cooperation between Verizon and its rivals is a cascade of antitrust actions by competitors seeking any possible leverage for cheaper assistance, then the effort to promote competition in local communications markets will end with competition badly weakened and consumers worse off. Cavalier's suit exemplifies some of the reasons such consequences would readily flow from a novel expansion of Section 2 duties.

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[6] Many of the individual state performance assurance plans are based on the plan adopted by the New York Public Service Commission (the "NYPSC") in the course of the proceedings leading up to Verizon's (and the industry's) first successful Section 271 application. The NYPSC specifically considered allegations by some CLECs that the performance remedy payments were "inadequate" and that the "overall amount at risk is too low to be effective." Order Adopting the Amended Performance Assurance Plan and Amended Change Control Plan at 17, *Petition of New York Tel. Co.*, Cases 97-C-0271 & 99-C-0949 (N.Y. Pub. Serv. Comm'n Nov. 3, 1999). The NYPSC rejected those arguments, concluding that CLECs had underestimated the likelihood that discriminatory treatment would be detected, and that the dollars at risk under the plan were "substantial" and sufficient to deter any discriminatory conduct by Verizon. *Id.* at 17-18.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of *Trinko*; if *Trinko* does not resolve the antitrust merits issue presented, the Court should grant the petition and affirm the Fourth Circuit's judgment.

Respectfully submitted.

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